

Mail Stop Interference  
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Filed: May 21, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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STRYKER CORPORATION,  
Junior Party  
(Patent 5,266,683,  
Inventors: Hermann Oppermann, Engin Ozkaynak, Thangavel  
Kuberasampath,  
David C. Rueger and Roy H.L. Pang),

v.

GENETICS INSTITUTE, LLC,  
Senior Party  
(Application 08/319,831  
Inventors: Rodney M. Hewick, Jack H. Wang, John M. Wozney and  
Anthony J. Celeste).  
Patent Interference 105,508 (RES)  
(Technology Center 1600)

Before: FRED E. McKELVEY, *Senior Administrative Patent Judge*, and  
RICHARD E. SCHAFFER, and MARK NAGUMO, *Administrative Patent  
Judges*.

SCHAFFER, *Administrative Patent Judge*.

**Judgment - Bd.R. 127**

- 1           This interference is between Stryker's Patent 5,266,683 and Genetic  
2   Institute's Application 08/319,831. The interference was declared because

an interference-in-fact existed between proteins claimed by Stryker and proteins claimed by Genetics Institute. The invention of the parties as set out in the sole count of the interference is

1. A purified BMP-8 protein or an isolated OP-2 protein comprising the sequence described by residues 1 to 402 of Seq. ID No. 28 of Patent 5,266,683 which protein induces new bone formation in mammals.

Paper 1, p. 3. The Declaration designated Stryker's Claims 21-26, 27/21, 28, 29, 39, 45-54, 58 and Genetics Institute's Claims 1 and 26-29 as corresponding to the count.

The parties were authorized to file certain motions, including motions asserting that the parties' claims did not interfere and priority of invention. A schedule was set for filing the motions and priority statements. Paper 3. The filing of the priority motions, while authorized, was deferred until the priority phase of the interference. Paper 24, p. 2. An expedited schedule was set for the no interference-in-fact motions. Paper 24, p.1. Those motions were denied (Paper 36) as was Stryker's request for reconsideration of the decision (Paper 42).

The parties' priority statements were due May 11, 2007. Paper 43, p. 3. No priority statements were filed. Additionally, the parties filed a joint statement that neither party will be filing a priority statement or any other authorized motions. Paper 44.

As the senior party, Genetics Institute need not file a priority statement, nor file a priority motion. Rather, Genetics Institute may rely on its effective filing date for priority. Stryker, however, as the junior party must file a priority statement in order to put on a priority case. 37 CFR § 41.204(b). Stryker's failure to file a priority

1 statement and the indication that no authorized motions would be filed  
2 is an abandonment of the contest and construed as a request for  
3 adverse judgment. 37 CFR § 41.127(b)(4).

4 Accordingly, it is

5 **ORDERED** that judgment on priority as to the subject matter  
6 of Count 1 (Paper 1, p. 3) is awarded against STRYKER  
7 CORPORATION;

8 **FURTHER ORDERED** that STRYKER CORPORATION, is  
9 not entitled to a patent containing claims 21-26, 27/21, 28, 29, 39,  
10 45-54, 58 (corresponding to Count 1) of Patent 5,266,683;

11 **FURTHER ORDERED** that a copy of this judgment be made  
12 of record in the file of Patent 5,266,683 and Application 08/319,831;

13 **FURTHER ORDERED** that if there is any settlement  
14 agreement which has not been filed, attention is directed to 35 U.S.C.  
15 § 135(c) and 37 CFR § 41.205; and

- 1           **FURTHER ORDERED** that the settlement agreement may be  
2   filed in paper rather than by e-mail.

/Fred E. McKelvey/                     )  
FRED E. McKELVEY                     )  
Senior Administrative Patent Judge    )

/Richard E. Schafer/                    ) BOARD OF PATENT  
RICHARD E. SCHAFER                    ) APPEALS AND  
Administrative Patent Judge            ) INTERFERENCES

/Mark Nagumo/                         )  
MARK NAGUMO                            )  
Administrative Patent Judge            )

cc (electronic filing):

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